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IN THE

Supreme Court of the United States

ROBERT SMITH,

Petitioner,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, AND TASH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR), founded in 1876, is the Nation's oldest and largest interdisciplinary organization of profession-

[*] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

als in the field of mental retardation. AAMR has appeared as *amicus curiae* before this Court in numerous cases.

THE ARC OF THE UNITED STATES (formerly the Association for Retarded Citizens of the United States), through its nearly 900 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW (BAZELON) is a national public interest organization founded in 1972 to advocate for the rights of children and adults with mental disabilities. Bazelon has written model laws, advocated for protective legislation, and participated either as counsel or *amicus curiae* in virtually all civil cases concerning mental disability law that have come before the U.S. Supreme Court, most recently in *Olmstead v. L.C.*, 527 U.S. 581 (1999), as well as in right to refuse medication cases such as *Riggins v. Nevada,* 504 U.S. 127 (1992) and *Washington v. Harper*, 494 U.S. 210 (1990).

THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, with approximately 2,500 members worldwide, is an organization of psychiatrists dedicated to excellence in practice, teaching, and research in forensic psychiatry.

TASH (previously known as The Association for Persons with Severe Handicaps) is an international association of people with disabilities, their family members, other advocates, and professionals concerned with human dignity, civil rights, education, and independence for all individuals with disabilities.

SUMMARY OF THE ARGUMENT

When this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), it did not eliminate or alter the central teaching of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry*): that jurors

must be given an unobstructed opportunity to evaluate relevant mitigating evidence about a capital defendant. Evidence that an individual defendant has a cognitive impairment** is vitally relevant to the evaluation by jurors whether death is an appropriate penalty.

The Fifth Circuit's formula of prerequisites that a defendant must satisfy before being accorded the jury consideration guaranteed by this Court in *Penry* is both unwarranted and unreasonable. Its requirement of a judicial pre-determination of a causal nexus between the disability and the crime strips the jury of its proper role in evaluating that crucial and contextually subtle question. The Court of Appeals' requirements that the disability be demonstrated to be permanent and "uniquely severe" are similarly unjustified.

A cognitive impairment shapes the individual's understanding of the world and his ability to function in life. Whether its source is a traumatic brain injury, dementia incident to another medical condition, or an intellectual impairment that places the defendant outside the definitional boundary of mental retardation, the opportunity to consider its mitigating significance in determining whether a defendant should be executed is central to the jury's function.

The obstacles placed by the Fifth Circuit in the path of jurors' fair consideration of a defendant's condition are inconsistent with this Court's teachings about the fundamental importance of the jury's role in determining the appropriate penalty in capital cases.

** *Amici* use the term "cognitive impairment" or "cognitive disability" throughout this brief to describe several disabilities involving substantially impaired intellectual functioning, including traumatic brain injuries, various forms of dementia, and intellectual impairment which fall short of the definition of "mental retardation."

ARGUMENT

I. IMPOSING BARRIERS TO PREVENT JURORS FROM CONSIDERING MITIGATING MENTAL DISABILITY EVIDENCE IS UNJUSTIFIABLE.

Central to the Eighth Amendment's protection in capital cases is the opportunity for jurors to weigh the significance of mitigating evidence, enabling them to evaluate the appropriateness of imposing the death penalty. Denying jurors the opportunity to give meaningful consideration to such evidence prevents them "from giving independent mitigating weight to aspects of the defendant's character" and "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Perhaps the most widely recognized example of such mitigation is evidence of a defendant's cognitive disability, "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). The principle reflected in this societal understanding about mental disability led this Court to require States to give jurors a meaningful opportunity to consider evidence of a defendant's mental retardation. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (*Penry*). This same principle prompted an increasing number of States to categorically prevent the imposition of the death penalty on defendants with mental retardation, and culminated in this Court's recognition of the existence of a national consensus against the practice. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

While the Eighth Amendment's categorical protection announced in *Atkins* is limited to defendants who have mental

retardation, the relevance of the *mitigating* significance of mental disability evidence recognized in *Penry* is not. Capital jurors weighing the fate of defendants who present evidence of substantially impaired intellectual functioning must be afforded an unimpeded opportunity to consider whether the individual's mental impairment makes him less culpable than defendants who have no such excuse. Any rule that denies jurors this critical opportunity should be supported by an exceedingly persuasive justification, and the Fifth Circuit has offered none.

A. The Fifth Circuit's Requirements Effectively Precluding Jury Consideration Of Substantial Cognitive Disabilities Are Unwarranted.

The Fifth Circuit has created a test that keeps relevant mitigating evidence of a defendant's cognitive disability from the jury. The Court of Appeals characterized the holding in *Penry* as providing an opportunity for the jury to consider mitigating evidence "because these characteristics were due to the uniquely severe permanent handicaps with which the defendant [Penry] was burdened through no fault of his own." *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc), *aff'd*, 506 U.S. 461 (1993). This description of the evidence submitted by Penry and the rationale for its consideration in his case was then reified into a prerequisite for any defendant seeking an instruction permitting jury consideration of mitigating evidence. *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994). Unless evidence of mental impairment offered by a defendant falls within this "narrow class," *Robison v. Johnson*, 151 F.3d 256, 263 (5th Cir. 1998), jurors are precluded from evaluating its potentially mitigating significance outside the confines of the special questions of the then-applicable Texas statute.

While mental retardation is a "permanent" and substantial disability, which is experienced by affected individuals "through no fault of their own," it does not logically follow

that all other cognitive impairments that are not perfectly identical, in every respect, to mental retardation are unworthy of jury consideration as potentially mitigating evidence. Each component of this screening "test," devised by the Fifth Circuit in *Madden* to prevent the consideration of mental disability evidence, is deeply problematic.

The Fifth Circuit's requirement that a disability must be found to be "uniquely severe" before a jury can consider it is both unclear and unwarranted. If the intention in using the word "unique" is to assert that the reasoning of this Court's opinion in *Penry* has no possible relevance or applicability to evidence of any cognitive impairment other than mental retardation, then the requirement is merely tautological.[1] If, on the other hand, the Fifth Circuit's intention is to suggest that no other form of mental disability is even remotely comparable to the impairment experienced by people with mental retardation, then it is obviously in error. For example, an individual with a cognitive disability that manifested itself in adulthood (such as a traumatic brain injury, or dementia associated with Alzheimer's disease or the later stages of AIDS) would not satisfy the definition of mental retardation in most States,[2] yet the disability can be equally severe and disabling. It defies reason to contend that such an individual is so fundamentally dissimilar from someone with mental

[1] Of course, if the principles announced in *Penry* are inapplicable to any condition except mental retardation, then this Court's decision ceased to have any significance, since, under *Atkins*, people with mental retardation are now ineligible for the death penalty. Nothing in either *Penry* or *Atkins* suggests such a result.

[2] Although most statutory definitions of mental retardation limit its scope to disabilities which arose "during the developmental period," *e.g.*, CONN. GEN. STAT. § 1-1g(a) (2000); *Atkins*, 536 U.S. at 309 n.3, at least two States focus solely on the individual's intellectual deficit and its impact on adaptive behavior, without reference to the age of the disability's onset. NEB. REV. STAT. § 28-105.01(3) (Supp. 2000); N.M. STAT. ANN. § 31-20A-2.1(A) (Michie Supp. 2000).

retardation as to preclude a *Penry* instruction. Similarly, an individual whose measured intelligence indicates a substantial impairment falling just short of the threshold of mental retardation will encounter most of the same limitations as a person who has mental retardation.[3] To deny such a defendant's jury the opportunity to evaluate the mitigating significance of his disability is fundamentally incompatible with the reasoning of *Penry*.[4]

The Fifth Circuit's insistence that a defendant's disability, in order to be evaluated by a jury, must be "permanent" is equally unwarranted. It is certainly true that for most individuals, mental retardation is a lifelong condition,[5] and it is also true that a number of other cognitive disabilities can be

[3] *See generally* M.K. Simpson & J. Hogg, *Patterns of Offending Among People with Intellectual Disability: A Systematic Review. Part II: Predisposing Factors*, 45 J. Intell. Disability Res. 397, 402 (2001) ("the association between offending and intellectual ability appears to be strongest in the borderline range").

[4] As indicated above, this Court's holding in *Atkins* requires defining the scope of exemption from the death penalty. There is no comparable necessity, or even rationale, for arbitrarily denying other defendants with cognitive disabilities the opportunity for individualized culpability assessment guaranteed in *Penry*.

[5] As this Court has noted, the definition of mental retardation requires both a significant intellectual impairment (placing the individual at least two standard deviations below the mean in measured intelligence) and an impact of that impairment on the individual's ability to function in society. *See Atkins*, 536 U.S. at 309 n.3; *Penry*, 492 U.S. at 308 n.1. *See generally Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985) ("reduced ability to cope with and function in the everyday world"). While we lack the technology to measurably increase an individual's basic cognitive ability, providing appropriate supports may allow some individuals to improve their ability to function in society to a level that is no longer consistent with the definition of mental retardation.

similarly enduring.[6] But a disability's permanence or impermanence has no bearing on its appropriate consideration as potentially mitigating evidence. The potential relevance of a defendant's mental disability to the sentencing process is the light it may shed on the individual's culpability at the time of the offense. *Penry*, 492 U.S. at 323; *Atkins*, 536 U.S. at 319. Whether the defendant was similarly impaired at some other point in time may help evaluate the legitimacy of the disability claim,[7] but it does not directly illumine the individual's level of culpability. Indeed, under both principles of *mens rea* and the defense of insanity, a temporary mental condition at the time of the offense, if sufficiently disabling, may preclude conviction altogether.[8] The Court of Appeals has offered no justification for arbitrarily denying jurors the opportunity to weigh the significance of such a disability for the much more limited (but incontrovertibly momentous) purpose of choosing between death and life as a punishment.[9]

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[6] *See, e.g.*, Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 152 (4th ed., text rev. 2000) ("Dementia may be progressive, static, or remitting.") [hereafter "*APA, DSM-IV-TR*"].

[7] For example, if there is documentation of the disability at an earlier stage of the individual's life, it may help dispel any concerns by the jury that a defendant may be malingering, and, similarly, the persistence of the disability past the time of the offense may permit clinicians to conduct a more thorough psychological evaluation. But the unavailability of such evidence is unrelated to the *relevance* of the individual's disability.

[8] *See, e.g., Beardslee v. United States*, 387 F.2d 280, 293 (8th Cir. 1967). *See generally* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 Fordham L. Rev. 21, 75 n.307 (1997).

[9] While the Fifth Circuit provides no justification for limiting the availability of *Penry* instructions to cases involving "permanent" cognitive disabilities, its purpose may have been to draw a distinction between mental retardation and a defendant's youth. *See generally Johnson v. Texas*, 509 U.S. 350, 368-69 (1993). But as this Court explained, youth is uniquely amenable to being considered under the special question of future dangerousness precisely because jurors would instinctively recognize the

It is similarly unjustified to insist that a defendant must demonstrate that he played no role in the etiology of his cognitive disability before the issue can be considered by a jury. Once again, the Fifth Circuit has singled out an attribute of mental retardation (as described in *Penry*), and generalized it into a prerequisite hurdle before a *Penry* instruction can be given in cases involving other cognitive disabilities. It is true that most defendants who have a substantial cognitive impairment acquired their disability without any personal responsibility for its occurrence.[10] But the fact that this is true of defendants with mental retardation, and of most individuals with other significant cognitive impairments, does not justify its imposition as an obstacle barring jurors' full consideration of the potentially mitigating significance of other defendants' cognitive disabilities. For example, an individual who has a substantial cognitive disability resulting from an earlier traumatic brain injury should be able to have it considered by a jury regardless of the precise cause of his injury.[11] If jurors concluded that a particular defendant's role

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relevance of its quintessential impermanence. *Id.* By contrast, other cognitive disabilities are like the mental retardation evidence in *Penry*, in that the jury cannot have confidence that the defendant will have an opportunity to emerge from its effects later in life and thereby to learn from his mistakes. Requiring the defense to *prove* the permanence of the disability before the jury can be given an opportunity to consider its mitigating potential serves no identifiable purpose.

[10] *See generally* Seymour L. Halleck et al., *The Use of Psychiatric Diagnoses in the Legal Process: Task Force Report of the American Psychiatric Association*, 20 Bull. Am. Acad. Psychiatry & Law 481, 494 (1992) ("Patients are generally not held responsible (in clinical interactions) for symptoms associated with cognitive impairments. . . .").

[11] For example, if an individual's traumatic brain injury resulted from an earlier motor vehicle accident, it should not matter, in deciding whether to give a *Penry* instruction in a capital case, if the defendant bore some responsibility for the original accident (e.g., a determination regarding comparative negligence in a tort action arising from the accident, or a determination that defendant should have been wearing a helmet while

in the etiology of his disability was relevant to its mitigating significance, they could, of course, impose the death penalty.[12] But there is no justification for placing the question beyond their "effective reach." *Cf. Graham v. Collins*, 506 U.S. 461, 475 (1993).[13]

Each of these component parts of the Fifth Circuit's barrier to the jury's reasoned evaluation of mitigating evidence of a defendant's cognitive impairment is loosely connected to *Penry* only in the sense that each is a characteristic of mental retardation. But none of these components negates the rele-

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riding a motorcycle). *See generally Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) ("In the end, the [statutory] disability definition does not turn on personal choice.").

[12] The intuitive expectation that jurors will be more sympathetic to mitigating circumstances that affected a defendant's culpability through no fault of his own appears to be borne out by social science research. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1564-65 (1998). But this observation does not support the contention that mitigation claims where the defendant's complete lack of responsibility for his condition is not proven to a judge must be withheld from jurors' consideration. Rather, it suggests that jurors are fully capable of evaluating whether a particular defendant's cognitive disability, in light of all the evidence presented, renders the death penalty inappropriate.

[13] As was true with "unique severity" and "permanence," the Fifth Circuit has failed to provide a rationale for this "nonresponsibility" limitation, but it seems likely that the intention was to preclude consideration of impairments caused by a defendant's voluntary use of alcohol or illegal drugs. The issues surrounding the relevance of such substance abuse to criminal sentencing has been widely debated for many years. *See, e.g.*, MODEL PENAL CODE § 210.6(4)(g) (1985); *Hardwick v. Crosby*, 320 F.3d 1127, 1167-69 (11th Cir. 2003); *People v. Leger*, 597 N.E.2d 586, 611 (Ill. 1992); *U.S. Sentencing Guidelines Manual* §§ 5H1.4, 5K2.13 (amended October 27, 2003). But concern about that separate and distinct issue provides no justification for a generalized and imprecisely-targeted requirement that all defendants demonstrate that they had nothing to do with the origin of their cognitive impairment before that disability can even be considered by a jury.

vance of a defendant's cognitive limitation to his individual culpability. And none of them renders the defendant's disability more amenable to fair consideration within the confines of the special questions framework at issue here.

B. The Fifth Circuit's "Nexus" Or "Causation" Requirement Is Both Unjustified And Unworkable.

Under the prerequisites imposed by the Fifth Circuit, a defendant is denied an opportunity to have a jury consider the mitigating significance of his cognitive disability unless he has satisfied a judge of the adequacy of a causal "nexus" between the crime and the disability. *Madden*, 18 F.3d at 307. As was the case with the categorical restriction of eligible disabilities, there may be a superficial attractiveness to requiring some demonstrated connection between a defendant's disability and the offense, but, upon closer inspection, the Fifth Circuit's limitation on the jury's consideration of the issue proves to be unwarranted.

Although the law frequently confronts complex questions of causation,[14] none is more difficult than determining when an attribute of a defendant's background or cognitive limitations "caused" the behavior which constitutes the offense for which he is prosecuted. And when the law has attempted to address this issue in a fashion that is too reductionist and simplistic, it has encountered unsatisfactory results.[15] Because of the intricate relationship between

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[14] *See generally* Wayne R. LaFave, *Criminal Law* § 6.4 (4th ed. 2003); RESTATEMENT (SECOND) OF TORTS §§ 431-32 (1965); H.L.A. Hart & A. M. Honoré, *Causation in the Law* (1959); Michael S. Moore, *Causation and the Excuses*, 73 Calif. L. Rev. 1091 (1985).

[15] *See, e.g., Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). *See also* Gary B. Melton, John Petrila, Norman G. Poythress & Christopher Slobogin, *Psychological Evaluations for the Courts* 197-98 (2d ed. 1997).

individual mental characteristics and human behavior, the Fifth Circuit's insistence on demonstrating a causal nexus before the jury is permitted to evaluate evidence of a defendant's cognitive limitations can fare no better.

The criminal law seldom encounters cases in which a defendant's circumstances or mental disability has rendered his behavior inevitable, in the sense that anyone who had that condition would have acted identically.[16] Nor can it ever be demonstrated that only a person who shared defendant's condition would have committed this particular offense. But just because the connection between a cognitive impairment and the commission of a crime does not fit neatly into a "but-for" explanation does not eliminate the often powerful relevance of that disability in understanding an individual's actions.

A defendant's cognitive impairment can be vitally important in assessing the level of culpability for his offense. The disability may help us understand the individual as "less culpable than defendants who have no such excuse." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring).[17] But determining whether, in a particular set of circumstances, his action is "attributable" to his impairment, *id.*, will call for

[16] *See generally* Antony Honoré, *Principles and Values Underlying the Concept of Causation in Law*, in *Causation in Law and Medicine* 3, 5 (Ian Freckelton & Danuta Mendelson eds., 2002) ("In the world of physics we can specify rather precisely what conditions will lead to what outcomes. . . . Organic matter is less easy to analyse in terms of causal sequences because living creatures are complex. Members of a species do not react in a uniform way.").

[17] M.K. Simpson & J. Hogg, *supra* note 3, at 401-02 ("[P]ersonal and social problems tend to be cumulative. This makes any attempt to identify which factor causes any other almost impossible, and the attempt possibly unhelpful.").

thoughtful assessment *by the jury* of a wide variety of factors.[18]

The connection between a defendant's cognitive impairment and his actions derives from the limitations imposed by the disabling condition.[19] A person with such an impairment has an understanding of the world (and of his actions) that is altered, and often distorted, by the prism of his disability. Its profound and pervasive effects on his experiences and abilities in life, including his moral reasoning and understanding of the consequences of his actions, are not directly identifiable from a telltale indication on a diagnostic imaging of his brain, nor are they marked by some "behavioral chromosome" that can be detected through an analysis of his DNA. But the fact that the link between an individual's cognitive impairment and his behavior cannot be conclusively

[18] *Amici* do not, of course, mean to suggest that the issue of causation is irrelevant to the mitigating consequence of a defendant's disability. Obviously, the reason a defendant's disability matters in sentencing is that it helps the sentencer understand the defendant's act. *See generally U.S. Sentencing Guidelines Manual* § 5K2.13 (requiring, for a downward departure, that "the significantly reduced mental capacity contributed substantially to the commission of the offense"). But under the federal Guidelines, the judge is the sentencer. Our concern is with the Fifth Circuit using the "causation" or "nexus" prerequisite finding to keep the sentencer in Texas capital cases, the jury, from considering the relevance of the defendant's disability.

[19] While, as a general matter, this conclusion will also be true for defendants with mental illness, there may be some cases in which an individual's conduct may be more directly traceable to an attribute of his mental disease. For example, a defendant who offers evidence that his crime was in response to a command hallucination (which was an acute symptom of his psychotic illness) can be thought of as offering to demonstrate that his conduct was a "product" of his mental condition. By contrast, individuals with mental retardation and other significant intellectual impairments are not "required" by their condition to behave in a precise way. Rather, their actions in life are profoundly influenced by their level of understanding and ability to make reasoned choices.

demonstrated by such direct and concrete evidence does not make it any less real. Nor does it lessen its relevance to the jury's task of assessing mitigating circumstances in determining an appropriate punishment.

Persons who have substantial cognitive impairments are no more "predestined" to commit criminal acts than are those with mental retardation or any other mental condition.[20] In this sense, a defendant will *never* be able to prove a perfect causal nexus to the crime. But the interplay between an individual's mental disability and human volition is both contextual and complex. It does not admit of a simplistic yes-or-no judicial formula. The impact of a person's cognitive disability, and how it has shaped his functioning in everyday life, will inevitably have a powerful influence on his behavior. In this sense, there will *always* be a relevant "nexus" between the defendant's cognitive impairment and the offense.

The Fifth Circuit's requirement that a causal connection be demonstrated *before* a jury can consider the potentially mitigating significance of a defendant's cognitive disability is unwarranted. In an effort to satisfy this prerequisite, clinical witnesses may be asked to opine conclusively on the causal connection. Given the intricacy of the relationship between a disability and the defendant's behavior, such testimony would be of questionable value.[21] More fundamentally, no valid purpose is served by requiring such testimony in pursuit of advance "proof" of the connection before it can be evaluated

[20] It is noteworthy that while this Court clearly understood that Johnny Penry's mental retardation was relevant to determining the appropriate penalty for his crime, it did not require that he demonstrate a "nexus" in order to obtain a jury instruction that would allow a jury to evaluate its significance. Similarly, the protection from the death penalty recognized by this Court in *Atkins* was not limited to those defendants who prove that their mental retardation "caused" their crimes.

[21] *See* Halleck et al., *supra* note 10, at 494.

by a jury. The Fifth Circuit has offered no justification for this requirement.

C. Jurors Must Be Allowed To Evaluate The Mitigating Relevance Of Any Significant Impairment Of Cognitive Functioning.

People who have substantially impaired cognitive functioning have many relevant characteristics in common with individuals who have mental retardation.[22] The measurement of their IQs may be nearly as (or comparably) severe, but more significantly, the level at which they perceive and understand the world and function in society, as well as their experiences in life, have crucial parallels to the lives of people with mental retardation.

[22] There are three possible reasons why such individuals do not fall within the definition of mental retardation. Some will be outside the definition because their disability first manifested in adulthood (i.e., beyond the "developmental period"). This would include disabilities arising from brain injuries and dementias that occurred after childhood. Others will be outside the definition if, because of successful provision of supports, their adaptive behavior is no longer impaired enough to constitute mental retardation. (While such people exist in society, *see* AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 9, 145-68 (10th ed. 2002) [hereafter "*AAMR 2002*"], in the experience of *amici*, they are seldom encountered in the criminal justice system.) Still others will be outside the definition because their measured intellectual impairment places them above the boundary of mental retardation. In this subgroup, *amici* are referring to impairments between one and two standard deviations below average (i.e., with IQ scores roughly between 85 and the low- to mid-70s). *See infra* note 23. *See also* Ruth Luckasson, *The Criminal Justice System and People with Mild Cognitive Limitations*, in *The Forgotten Generation: The Status and Challenges of Adults with Mild Cognitive Limitations* 347, 348-49 (Alexander J. Tymchuk, K. Charlie Lakin & Ruth Luckasson eds., 2001) [hereafter "*Forgotten Generation*"].

Individuals with cognitive impairments that place them above the boundary of mental retardation[23] share many of the

[23] *Amici* respectfully suggest that the term "borderline" is problematic in discussing these individuals. Despite its apparent aptness, it has considerable potential for confusion because of its multiple meanings in the clinical literature. For a relatively brief period of time (roughly the 1960s) the definition of mental retardation encompassed people whose IQ was between one and two standard deviations below the mean, and this group was denominated "borderline retarded." *See* Am. Ass'n on Mental Deficiency (now renamed AAMR), *A Manual on Terminology and Classification in Mental Retardation* 3, 86 (1961). This classification system proved unsatisfactory because it was perceived as unnecessarily stigmatizing the individuals so labeled, and in all subsequent revisions, the definition of mental retardation has identified the boundary as two standard deviations. *E.g.*, Am. Ass'n on Mental Deficiency, *Manual on Terminology and Classification in Mental Retardation* 18 (1973 rev.). *See generally AAMR 2002*, *supra* note 22, at 26-27. (Obviously, abandoning the classification of "borderline retarded" did not change the actual impairment those individuals experienced, but merely attempted to spare them an undesirable source of stigmatization. Andrea Zetlin & Michael Murtaugh, *Whatever Happened to Those with Borderline IQs?*, 94 Am. J. Mental Retardation 463 (1990); Luckasson, *supra* note 22, at 352.) Courts have frequently used the term in inconsistent and confusing ways, sometimes describing as "borderline" individuals whose disability would have placed them in that category in the earlier system, and at other times, using the same term to describe people who *are* within the current definition of mental retardation, but whose disability places them relatively near the boundary (i.e., two standard deviations).

To further confuse matters, "borderline" is also a mental illness term used by psychiatrists and other clinicians to describe a form of mental *illness* that bears no relationship at all to the intellectual impairments at issue in this case. *See generally APA, DSM-IV-TR*, *supra* note 6, at 706-710; Michael H. Stone, *The Fate of Borderline Patients: Successful Outcome and Psychiatric Practice* 9-11 (1990).

For somewhat different reasons, care is also appropriate in the use of the term "mild mental retardation." When professionals in the field employed a descriptive classification of intensity, they chose "mild," "moderate," "severe," and "profound" as the labels for subgroups of people with mental retardation. Under that taxonomy, roughly 90% of the individuals who fall within the definition of mental retardation were

life experiences of people with mental retardation.[24] They face similarly difficult conditions in terms of employment,[25] health care,[26] and education.[27] They also share an increased

labeled as having "mild" mental retardation. (That frequency is even higher among individuals facing criminal prosecutions.) Unlike the term "borderline," *all* of the individuals described as having "mild" mental retardation fall *within* the definition of mental retardation, and thus all come under the protection of *Atkins*. Although some clinicians continue to employ it, the "mild/moderate/severe/profound" descriptive system has been rejected by AAMR for more than a decade, in part because of its overemphasis on IQ scores (as compared to an individual's practical disabilities), and also out of concern about the misleading impression left by the term "mild." *AAMR 2002*, *supra* note 22, at 26, 207.

[24] *See* Glenn T. Fujiura, *Continuum of Intellectual Disability: Demographic Evidence for the "Forgotten Generation,"* 41 Mental Retardation 420, 426 (2003).

[25] Alexander J. Tymchuk, *Family Life: Experiences of People with Mild Cognitive Limitations*, in *Forgotten Generation*, *supra* note 22, at 249 ("The majority of individuals with mild cognitive limitations live in poverty because they are either unemployed or employed in low-paying jobs.").

[26] Deborah M. Spitalnik & Sheryl White-Scott, *Access to Health Services: Improving the Availability and Quality of Health Services for People with Mild Cognitive Limitations*, in *Forgotten Generation*, *supra* note 22, at 203, 206 ("Individuals with mild cognitive limitations as well as people with more severe disabilities are at a medical disadvantage and share similar disincentives to health care. These disincentives include lack of access to care, nonexistent or unavailable medical histories, fragmentation of medical care, lack of trained health professionals in the area of disabilities, lack of transportation, and lack of continuity of care.").

[27] Donald L. MacMillan et al., *Current Plight of Borderline Students: Where Do They Belong?*, 33 Educ. & Training in Mental Retardation & Developmental Disabilities 83, 92 (1998) ("Differences between borderline and average ability referred students were far more pronounced than differences between borderline and students with mental retardation."); *id.* ("We believe that these results argue for 'differences of degree rather than kind' when we talk about children ranging in IQ from the mid-60s to the mid-80s.").

likelihood of experiencing cognitive and behavioral difficulties associated with very low birthweight or the effects of fetal exposure to alcohol.[28]

As with people who have mental retardation, the combination of their cognitive disability with abuse and other problems in childhood can compound the difficulties they encounter as adults.[29] And the same problems can coexist with (and, ironically, can mask) mental illness and other psychological problems.[30] Similarly, these individuals also experience the difficulties to coping and succeeding in life

[28] Glen P. Aylward, *Cognitive and Neuropsychological Outcomes: More than IQ Scores*, 8 Mental Retardation & Developmental Disability Research Reviews 234, 239 (2002); Campbell M. Clark et al., *Structural and Functional Brain Integrity of Fetal Alcohol Syndrome in Nonretarded Cases*, 105 Pediatrics 1096, 1096-97 (2000); Kimberly A. Kerns et al., *Cognitive Deficits in Nonretarded Adults with Fetal Alcohol Syndrome*, 30 J. Learning Disabilities 685 (1997); Sarah N. Mattson et al., *Teratogenic Effects of Alcohol on Brain and Behavior*, 25 Alcohol Res. & Health 185 (2001).

[29] *See generally* Stephen A. Richardson, Helene Koller & Mandy Katz, *Relationship of Upbringing to Later Behavior Disturbance of Mildly Mentally Retarded Young People*, 90 Am. J. Mental Deficiency 1 (1985); Iris Tan Mink, C. Edward Meyers & Kazuo Nihira, *Taxonomy of Family Life Styles: II. Homes with Slow-Learning Children*, 89 Am. J. Mental Deficiency 111, 116 (1984). *See also Penry*, 492 U.S. at 319-28.

[30] *See* Philip G. Rourke & Donald M. Quinlan, *Psychological Characteristics of Problem Children at the Borderline of Mental Retardation*, 40 J. Consulting & Clinical Psychology 59, 60 (1973); Steven Reiss, *People with a Dual Diagnosis: America's Powerless Population*, in *Forgotten Generation, supra* note 22, at 275; Sharon A. Borthwick-Duffy & Richard K. Eyman, *Who Are the Dually Diagnosed?*, 94 Am. J. Mental Retardation 586, 591-92 (1990) (reporting greater incidence of mental illness and aggressive behavior at higher IQ levels among cognitively impaired individuals); Steven Reiss, Grant W. Levitan & Joseph Szyszko, *Emotional Disturbance and Mental Retardation: Diagnostic Overshadowing*, 86 Am. J. Mental Deficiency 567 (1982).

imposed by reduced cognitive ability.[31] These problems, in turn, are often exacerbated by the stigmatization the individuals experience from being identified as having mental disabilities.[32] And while all of these effects can be lifelong, the clinical literature strongly suggests that these problems are experienced most acutely in late adolescence and young adulthood, particularly in the process of transition from school life.[33]

Defendants with other forms of substantial cognitive impairments, who may also be denied *Penry* instructions under the Fifth Circuit's test, present similar issues. In particular, individuals with traumatic brain injuries,[34] various forms of dementia,[35] and some persons with epilepsy or

[31] *See generally* Harold G. Levine & L.L. Langness, *Everyday Cognition Among Mildly Mentally Retarded Adults: An Ethnographic Approach*, 90 Am. J. Mental Deficiency 18, 25 (1985).

[32] *See* Jim L. Turner, Keith T. Kernan & Susan Gelphman, *Speech Etiquette in a Sheltered Workshop*, in *Lives in Process: Mildly Retarded Adults in a Large City* 43, 60-68 (Robert B. Edgerton ed., 1984) (discussing intense negative reaction to mention of mental retardation).

[33] *See, e.g.*, Andrea G. Zetlin & Gale M. Morrison, *Adaptation Through the Life Span*, in *Handbook of Mental Retardation and Development* 481-503 (Jacob A. Burack, Robert M. Hodapp & Edward Zigler eds., 1998), and sources cited therein.

[34] *See, e.g.*, Marilyn F. Kraus, *Neuropsychiatric Sequelae: Assessment and Pharmacologic Interventions*, in *Traumatic Brain Injury* 173, 176-78 (Donald W. Marion ed., 1999) (discussing behavioral disturbances, aggression, and cognitive impairments); William W. McKinlay & Anna J. Watkiss, *Cognitive and Behavioral Effects of Brain Injury*, in *Rehabilitation of the Adult and Child with Traumatic Brain Injury* 74, 77-82 (Mitchell Rosenthal et al. eds., 3d ed. 1999).

[35] *See, e.g., APA, DSM-IV-TR* at 147-71; Nancy L. Mace, *The Management of Problem Behaviors*, in *Dementia Care: Patient, Family, and Community* 74 (Nancy L. Mace ed., 1990); Peter V. Rabins, Constantine G. Lyketsos & Cynthia D. Steele, *Practical Dementia Care* 156-70 (1999) (discussing mood problems, hallucinations, paranoia, and delusions); Myron F. Weiner & Linda Teri, *Psychological and Behavioral*

seizure disorders[36] may have comparable claims to an opportunity for jurors to consider the mitigating relevance of their disabilities.

II. THE OBSTACLES IMPOSED BY THE FIFTH CIRCUIT ARE INCONSISTENT WITH THIS COURT'S DECISIONS REGARDING MITIGATING EVIDENCE.

This Court has consistently emphasized the central importance of the consideration of mitigating evidence in evaluating whether the death penalty is warranted in an individual defendant's case. *See, e.g., Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987); *Lockett*, 438 U.S. at 605.

Accommodating the Texas system of special questions to this constitutional principle has not been easy.[37] This Court found the structure of the Texas system to be constitutionally acceptable, in large part, because by "authorizing the defense to bring before the jury at the separate sentencing hearing *whatever mitigating circumstances relating to the individual defendant* can be adduced, Texas has assured that the

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Management, in *The Dementias: Diagnosis, Treatment, and Research* 181 (Myron F. Weiner & Anne M. Lipton eds., 3d ed. 2003).

[36] Oscar Doval, Moises Gaviria & Andres M. Kanner, *Frontal Lobe Dysfunction in Epilepsy*, in *Psychiatric Issues in Epilepsy* 261, 264-67 (Alan B. Ettinger & Andres M. Kanner eds., 2001) (discussing cognitive deficits and psychiatric symptoms); Alan B. Ettinger & Alan L. Steinberg, *Psychiatric Issues in Patients with Epilepsy and Mental Retardation*, in *id.* at 181, 185-86 (discussing impulse control disorders); Steven C. Schachter, *Aggressive Behavior in Epilepsy*, in *id.* at 201, 206 (citing studies suggesting aggressive or violent behavior may be due to side effects of anti-epileptic drugs).

[37] The issue posed in these cases appears to apply exclusively to Texas. Oregon, whose statute also incorporates the special question format, has determined that defendants are entitled to a jury instruction that invites consideration of all relevant mitigating evidence. *See State v. Wagner*, 786 P.2d 93, 101 (Or. 1990) (en banc).

sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (emphasis supplied). Over the years, the Court has found it necessary to resolve recurring questions about which types of mitigating evidence are amenable to fair consideration under this system and which types require a separate instruction regarding mitigation. *See Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring in the judgment); *Penry*, 492 U.S. at 328; *Johnson v. Texas*, 509 U.S. at 369; *Penry v. Johnson*, 532 U.S. 782, 804 (2001) (*Penry II*).

But as the Court has wrestled with these cases, it has always emphasized that the State cannot place important mitigating evidence beyond the jurors' effective reach. This Court has only rejected claims that the jury should have received an additional instruction when it was satisfied that a particular type of mitigating evidence could be unambiguously evaluated under the special questions.

The Fifth Circuit's *Madden* requirements, separately and in their aggregation, fail to recognize that other intellectual impairments are no more readily cognizable under the special question regime than was mental retardation. By excluding substantial impairments of cognitive functioning from its implementation of this Court's clear directive in *Penry*, the Fifth Circuit has consigned individuals with those disabilities to the same dilemma previously faced by defendants with mental retardation: the jury has been given no straightforward and unencumbered opportunity to consider the disability's mitigating significance.

III. JURORS MUST BE FREE TO PERFORM THEIR VITAL FUNCTION OF EVALUATING THE MITIGATING SIGNIFICANCE OF MENTAL DISABILITY EVIDENCE.

As this Court has emphasized, jurors must not only have an opportunity to *hear* relevant mitigating evidence, they must

be given a clear and logical opportunity to evaluate and *act upon* that evidence.[38] The Fifth Circuit's rule deprives jurors of such an opportunity in cases involving potentially powerful mitigating evidence of a defendant's substantially impaired cognitive functioning.

Other cognitive disabilities are no more amenable to fair evaluation within the context of Texas' special questions than mental retardation was in *Penry*. Like Penry's claim, such disabilities are incapable of full mitigating consideration under the "prospective dangerousness" question, because, exactly like mental retardation, they may be seen as a "two-edged sword" regarding future conduct.[39] The Fifth Circuit has offered no reasoning to demonstrate that this Court's concerns about jurors' ambivalent views about future

[38] Most State legislatures that have enacted statutes concerning mental retardation and the death penalty have recognized the importance of preserving the jury's role in evaluating mitigating evidence that has not been found to warrant exemption from the penalty. Some explicitly mention mental disability as a mitigating circumstance for cases in which the defendant has not been found to have mental retardation. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703.02(C) (West Supp. 2003); N.C. GEN. STAT. § 15A-2005 (2003); UTAH CODE ANN. § 77-15A-104(14)(c)(iii) (2003). *See also Murphy v. State*, 54 P.3d 556, 568 (Okla. Crim. App. 2002). Other States explicitly provide that an adverse ruling on the question of mental retardation may not be communicated to the jury which will consider mitigating evidence. 2003 CAL. LEGIS. SERV. 700 (West); IDAHO CODE § 19-2515A (Michie 2003); N.M. STAT. ANN. § 31-20A-2.1(C) (Michie Supp. 2000).

[39] *Penry*, 492 U.S. at 324. Both reduced culpability and concern about future dangerousness were prominent themes in the era of eugenic approaches to cognitive impairments early in the 20th Century. *See, e.g.*, Henry Herbert Goddard, *The Criminal Imbecile: An Analysis of Three Remarkable Murder Cases* (1915). Although tragically misguided beliefs about both eugenic sterilization and segregation have been emphatically rejected in light of modern understanding of people with disabilities, it is noteworthy that even the harshest of those earlier views recognized the reduced culpability of the individuals described.

dangerousness are in any way different for other forms of cognitive impairment.

Yet despite jurors' concerns about future dangerousness, there is every reason to conclude that they would find these cognitive disabilities potentially mitigating in individual cases if offered a clear opportunity to consider them.

It is widely recognized that evidence regarding a defendant's mental impairment may be among the most persuasive mitigation evidence in jurors' estimation. *See Williams v. Taylor*, 529 U.S. 362, 398 (2000). *See generally* Garvey, *supra* note 12, at 1564. While this evidence can be given focus by expert witnesses, jurors are likely to begin with an instinctive understanding that individuals with cognitive disabilities are less culpable for their acts than "defendants who have no such excuse." *Penry*, 492 U.S. at 322. Jurors' understanding of this basic truth will include portrayals of such individuals in literature and popular culture.[40] But in addition, in light of the increased educational opportunities for students with disabilities over the last twenty-five years,[41] jurors' life experiences are likely to include more interactions with people who have cognitive impairments than would have been true in earlier generations.[42]

[40] Such accounts will range from characters in literary fiction, such as *Of Mice and Men* and *Native Son*, to portrayals on television in programs like *L.A. Law* and *Life Goes On*, and films such as *Rain Man*, *Being There*, *Sling Blade*, and *Forrest Gump*. While these portrayals vary somewhat as to their precise clinical accuracy, they convey a basic understanding of how a disabled individual's intellectual limitations intersect with other aspects of their character and behaviors.

[41] *See generally* Education of All Handicapped Children Act of 1975, P.L. 94-142, now codified as Individuals with Disabilities Education Act, 20 U.S.C. § 1401 *et seq.* (2000).

[42] *Cf.* Junean Krajewski & Thomas Flaherty, *Attitudes of High School Students Toward Individuals with Mental Retardation*, 38 Mental Retardation 154, 160 (2000).

But jurors' instinctive and experiential understanding about people with cognitive impairments cannot be given fair evaluation without an instruction that permits the disabilities to be considered. "A sentencer must be allowed to give *full* consideration and *full* effect to mitigating circumstances. For it is only when the jury is given a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision, that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence."[43]

CONCLUSION

For these reasons, *amici* urge reversal of the judgment of the Court of Appeals.

Respectfully submitted,

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[43] *Penry II*, 532 U.S. at 797 (emphasis in original) (internal quotations omitted).